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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

No. 12-IIB05

March 27, 2012

REQUESTED BY:

Senator Patricia Blevins
Legislative Hall

and

Ms. Carol Furr

OPINION BY:

Kent Walker, Deputy Attorney General
Delaware Department of Justice

and

Lawrence W. Lewis, State Solicitor
Delaware Department of Justice

OPINION

Senator Blevins has requested that we investigate whether the denial of public access to the February 13, 2012 meeting of the Board of directors of the Kent County Society for the Prevention of Cruelty to Animals ("KCSPCA") was a violation of the Delaware Freedom of Information Act, 29 *Del. C.* ch. 100 ("FOIA"). Senator Blevins' request is based on an email she received from Ms. Carol Furr relating how she and several others were denied access to that meeting.

In accordance with 29 Del. C. §10005 (e), we are treating that request as a petition for a determination as to whether FOIA has been violated.

On March 8, 2012 we referred the Petition to Steven Schwartz, Esquire, legal counsel to the KCSPCA for its response. Mr. Schwartz by letter dated March 15, 2012 responded, contending that the KCSPCA was not a "public body" as defined by FOIA and, hence, was not subject to its open meeting requirements.

We conclude to the contrary, that the KCSPCA is a "public body," that the meeting of its Board on February 13, 2012 was a public meeting subject to the open meeting requirements of FOIA, §1004, and that the denial of public access to that meeting violated FOIA.

ANALYSIS

The term "public body" is defined at 29 Del. C. §10002 (c) as follows:

(c) "*Public body*" means, unless specifically excluded, *any* regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any political subdivision of the State, including, but not limited to, any board, bureau, commission, department, agency, committee, ad hoc committee, special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, *association, group*, panel, council or any other entity or body established by an act of the General Assembly of the State, or *established by any body established by the General Assembly of the State*, or appointed by any body or public official of the State or otherwise empowered by any state governmental entity, which:

(1) *Is supported in whole or in part by any public funds; or*

(2) *Expend or disburses any public funds, including grants, gifts or other similar disbursements and distributions; or*

(3) *Is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations.* [Emphasis supplied.]

Our analysis reveals that KCSPCA meets these criteria because (1) it is an association or group established by a body established by the General Assembly, and (2) it is specifically

empowered by a state government entity, (3) to make investigations¹ and to enforce all of Delaware's animal anti-cruelty laws, and (4) that it is supported, at least in part, by public funds and (5) that it expends those public funds.

This definition means that *any* entity is a "public body" if it meets *both* (1) *any* of the criteria in the lettered paragraph (c) *and* (2) *any* of the criteria of the numbered subparagraphs (1) – (3).

The following facts show how the KCSPCA meets the criteria of lettered subparagraph (c) and its sub-subparagraphs (1) and (3):

The KCSPCA is Delaware corporation whose Certificate of Incorporation was filed with the Delaware Secretary of State on June 26, 1964. Its Certificate of Incorporation declares that it will conduct its business so as to qualify as a not-for-profit organization under § 501 (c) (3) of the *Internal Revenue Code* as a membership organization with a Board of Trustees. Accordingly, it is an "association" or "group" established by an act of the Secretary of State which, in turn, is established by the General Assembly.

The KCSPCA meets the criteria set out in sub-subparagraph (1) because it is supported, at least in part, by public funds, which, in the 146th General Assembly, consisted of a grant-in-aid of \$3,000². *See* 78 *Del. Laws* 77.³

Finally, the KCSPCA meets the criteria set out in sub-subparagraph (3) because its members and agents are empowered specifically by the General Assembly, a state governmental

¹ While those statutes charging KCSPCA with the enforcement of the animal anti-cruelty laws do not specifically mention "investigation," we have no doubt that those mandates to enforce necessarily imply a corresponding duty to make investigations. In other words, authority to enforce cannot be exercised without authority to make investigations.

² In the 145th General Assembly, it received a grant-in-aid of \$3,600 and in the 144th General Assembly a grant-in-aid of \$4,600.

³ Although grants-in-aid were initially excluded from the definition of "public funds," that exclusion has since been removed. *See* 64 *Del. Laws* c. 113.

entity, to enforce "all laws which are enacted for the protection of dumb animals." 3 *Del. C.* § 7902. ⁴

CONCLUSION

For these reasons, we determine that the KSCPAC is a "public body," as defined by FOIA, and that, accordingly, it must comply with all the open meeting requirements of FOIA, including public access to the meetings of its board of directors or trustees.

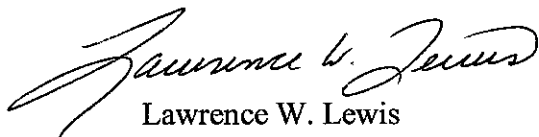
We reserve the right to pursue any remedies we may have under 29 *Del. C.* § 10005.

Very truly yours,



Kent Walker
Deputy Attorney General

Approved:



Lawrence W. Lewis
State Solicitor

cc: Charles E. Butler, Chief Deputy Attorney General

⁴ Acts that constitute "Cruelty to Animals" are set out in Delaware's criminal code at 11 *Del. C.* § 1325.